



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DECISION FOR PUBLIC RELEASE

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Matter of: Ameriko, Inc.

File: B-266034.2

Date: March 18, 1996

Christopher Solop, Esq., and William R. Purdy, Esq., Ott & Purdy, for the protester. Joseph G. Billings, Esq., and Dennis J. Riley, Esq., Riley & Artabane, for Maintenance, Inc., an interested party. William J. Hemmer, Esq., and Clarence D. Long III, Esq., Department of the Air Force, for the agency. Marie Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably classified painting work as covered by the Service Contract Act rather than the Davis-Bacon Act, where vast majority of painting work was to be performed in conjunction with change of occupancy maintenance services for military housing, rather than as part of construction projects.
2. Protest challenging rejection of proposal for failure to comply with Service Contract Act (SCA) wage rate is denied where, even if protester were correct that agency should have held discussions rather than reject the proposal—because solicitation was confusing as to whether SCA or Davis-Bacon Act wages applied—protester's late best and final offer based on SCA wages shows that protester's price would not have been low, and that protester therefore would not have been in line for award in any case.

DECISION

Ameriko, Inc. protests the award of a contract to Patriot Maintenance, Inc. under request for proposals (RFP) No. F25600-94-R-0111, issued by the Department of the Air Force for military family housing maintenance at Offutt Air Force Base, Nebraska. Ameriko contends that the agency improperly rejected the firm's best and final offer (BAFO) based on noncompliance with the Service Contract Act (SCA), while accepting the awardee's BAFO, which included cost data showing a wage rate below the applicable SCA rate.

We deny the protest.

The RFP contemplated award of a contract for a base year with 4 option years. Offers were to provide a fixed, lump-sum price for definite quantity basic maintenance work and fixed-unit prices (but not labor rates) for indefinite quantity change of occupancy maintenance (COM) work, such as major painting, and other work not included in basic maintenance. There were two indefinite quantity painting line items: major interior painting of more than 200 square feet and exterior painting of any square footage.¹ Also included as indefinite quantity work was various repair work, e.g., major roof repair.

Award was to be made on "a technically acceptable, realistically low price basis." Price proposals were to be evaluated for reasonableness, completeness, and realism, and all necessary data was to be furnished for this analysis. For realism, proposed costs were to be evaluated only to determine if any costs were unrealistically high or low in relation to the offeror's technical approach and the government estimate.²

Since the RFP required performance of both service and construction work, it contained the applicable SCA (minimum wage rates applicable to service contracts) and Davis-Bacon Act (DBA) (minimum wages applicable to construction work) provisions.³ The RFP did not specify which wage rate determination applied to the various line items; however, both determinations included a minimum wage rate for painter--\$13.26 under the SCA (maintenance painter) and \$10 under the DBA (painter). During the preproposal conference, three attendees asked whether any of the work or line items were considered covered by the DBA. The contracting officer responded, "[i]t is the contractors' responsibility to correctly categorize their employees. . . . [Any] questions concerning labor laws . . . should be directed to the [DOL] Wage and Hour Division."

¹The exterior painting included wood trim, sheds, fences, and exterior walls. In this regard, the RFP's statement of work provided that "[i]t is never the intent of the contract to paint the exterior of an entire house."

²The RFP originally called for "such data as necessary to determine the cost realism of proposed prices as delineated in Section B [bidding schedule] of [the] solicitation." However, amendment No. 0003 deleted this instruction.

³The SCA requires that service contracts with the government in excess of \$2,500 contain a provision specifying minimum wages and fringe benefits, specified by the Department of Labor (DOL), to be paid to employees in the performance of the contract. 41 U.S.C. § 351(a)(1) (1994). The DBA sets forth an equivalent requirement for contracts in excess of \$2,000 for construction, alteration, and/or repair of public buildings or public works. 40 U.S.C. § 276a(a) (1994).

Seventeen proposals were received. The agency determined that 12, including Ameriko's and Patriot's, were technically acceptable and in the competitive range. It held written discussions, and requested and received BAFOs. Ameriko's BAFO price was low (\$12,674,247) and Patriot's was second low (\$13,057,750). In its cost realism analysis, the agency determined that "each offeror's BAFO reflect[ed] each offeror's ability to perform the requirements . . . and does not over inflate costs."

Ameriko's initial proposal price (\$13,294,270) was based on the SCA painter wage, but its BAFO cover letter stated that the firm reduced its price based on "the application of Davis Bacon wage rates relative to interior and exterior painting requirements. . . ." The contracting officer determined that this change was a violation of the SCA, and verified with the DOL that the painting work in fact was SCA work. On August 4, Ameriko was notified that "there was a mistake in its BAFO" and that the BAFO was "not acceptable" based on its change of painting wage rate from SCA to DBA. Ameriko, apparently on its own initiative, then submitted a revised price proposal of \$13,081,947, which again applied the SCA painting wage rate in lieu of the DBA rate. The agency considered this an unacceptable late BAFO which was not low in any case. Therefore, the agency made award to Patriot as the low, technically acceptable offeror.

Ameriko argues that the Air Force improperly rejected the firm's low initial BAFO; according to the protester, it properly applied the DBA to the painting work.

Generally, responsibility for determining whether SCA or DBA provisions apply to a particular contract rests primarily with the contracting agency, which must award, administer, and enforce the contract. Dynalelectron Corp., 65 Comp. Gen. 290 (1986), 86-1 CPD ¶ 151; Madison Servs., Inc., B-256834, Aug. 3, 1994, 94-2 CPD ¶ 54. In this regard, the determination of whether items of work involve basic maintenance within the coverage of the SCA, or are more in the nature of construction, alteration, or repair within the scope of the DBA, is fundamentally a matter of agency judgment. Id. We will question the agency's determination only where it lacks a reasonable basis. Id.

DOL regulations provide that, where contracts principally for services also involve substantial construction work, the provisions of both the SCA and DBA apply. 29 C.F.R. § 4.116(c)(2) (1995). To be covered by the DBA in a service contract, a work project must be (1) physically and functionally separate from the service work called for in the contract and, as a practical matter, capable of being performed on a segregated basis from the service contract work, and (2) greater than the statutory threshold of \$2,000 applicable to DBA work. Federal Acquisition Regulation § 22.402(b); K & M Maintenance Servs., Inc., B-236239, Nov. 21, 1989, 89-2 CPD ¶ 482.

The agency reasonably determined that the painting work here was covered by the SCA, not the DBA. It does not appear from the RFP that the painting work is

severable from the COM service work such that it will be performed apart from the service contract work. The vast majority of painting work is to be performed inside the housing units, and the RFP provides that the major painting work will "normally" be accomplished "in conjunction with COM." Further, it does not appear that the painting will be performed under individual service calls or orders; the statement of work listing of categories of job orders includes COM, but not painting. The agency considers COM to be service work covered by the SCA, since it generally involves tasks related to preparing housing units for new occupants, rather than construction-related work; we find no basis for questioning this categorization by the agency, and the protester has not argued or presented evidence showing that the COM work here in fact is in the nature of construction.⁴ Moreover, the agency reports that it verified with DOL that the SCA wage rates for painters are applicable.⁵ We conclude that the agency reasonably determined that the painting work is not severable from the services which comprise the majority of the contract work, and that the SCA, not the DBA, thus was applicable for purposes of determining the painter wage rate.

Ameriko argues alternatively that its initial BAFO should not have been rejected without discussions to make it clear whether the SCA or DBA applied to the painter labor category.⁶ However, the record suggests that, even had such information been presented during discussions, Ameriko would not have been the low offeror. This is because Ameriko ultimately did submit a revised BAFO--albeit, one that was rejected as late--based on the SCA painter wage rate, and that BAFO was higher priced than Patriot's. Ameriko does not argue, and there is no reason to believe, that Ameriko's SCA-based BAFO would have been lower priced had discussions

⁴The protester cites our decision in Steel Circle Bldg. Co., B-233055; B-233056, Feb. 10, 1989, 89-1 CPD ¶ 139, for the proposition that COM interior painting work for military family housing maintenance is construction work covered by the DBA since it was included in a solicitation with only DBA provisions. However, while the solicitation there did include DBA provisions, the propriety of applying the DBA wage determination (instead of the SCA wage determination) was not in issue; that decision therefore is not dispositive here. We note that solicitations for COM and painting work for military family housing also have included only SCA provisions. See State Management Servs., Inc. et al., B-255528.6 et al., Jan. 18, 1995, 95-1 CPD ¶ 25 (again, the propriety of the wage determination was not in issue in the decision).

⁵We will not substitute our judgment as to the applicability of the SCA for that of DOL, unless DOL's judgment is clearly contrary to law. B.B. Saxon Co., Inc., 57 Comp. Gen. 501 (1978), 78-1 CPD ¶ 410.

⁶We note that Ameriko did not challenge the adequacy of the RFP in a pre-closing time protest. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1995).

been held. It thus is apparent that, even had Ameriko been made aware that the SCA (rather than the DBA) painter wage rate applied, this information would not have led Ameriko to offer the lowest price, or otherwise put Ameriko in position to receive the award. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ ____ (protest will not be sustained absent showing of reasonable possibility that protester was prejudiced by agency's actions); Marwais Steel Co., B-254242.2; B-254242.3, May 3, 1994, 94-1 CPD ¶ 291.

Ameriko maintains that it was unfair for the agency to reject its BAFO based on noncompliance with the SCA, while accepting Patriot's, whose cost data was assertedly based on a painter wage rate below both the SCA and DBA rates. The agency's actions were proper. Because Ameriko's BAFO cover letter specifically took exception to paying the applicable minimum SCA wages for painters, and thus indicated an intention not to be bound by the terms of the SCA, the agency properly determined that its offer could not be accepted. See Emerald Maintenance, Inc., 70 Comp. Gen. 355 (1991), 91-1 CPD ¶ 320. In contrast, Patriot's BAFO did not take exception to the SCA. See Northern Virginia Serv. Corp., B-258036.2; B-258036.3, Jan. 23, 1995, 95-1 CPD ¶ 36. A contracting agency properly may award a contract to an offeror whose proposal indicates that its price is based on hourly rates below the SCA wage rates, so long as the proposal does not take exception to the terms of the solicitation, such that it will be obligated to pay the applicable wage rates to the employees. See McDonald-Bradley, *supra*; PRC/VSE Assocs. Joint Venture, B-240160 *et al.*, Oct. 30, 1990, 90-2 CPD ¶ 348.

Ameriko argues that the agency was required to take into account the pricing data Patriot submitted with its proposal showing a painter wage below the SCA and DBA rates. This argument is without merit because Patriot's pricing data did not state the wages it would specifically pay painters. In any case, under a fixed-price contract, the awardee is required to pay employees the applicable SCA wages out of whatever price it has offered the government; labor rates lower than the required SCA minimum rates may simply constitute a below cost offer and are legally unobjectionable. See Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ 339.

Finally, Ameriko alleges that the Air Force violated the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d)(3)(A)(i) (1994), by not suspending performance of Patriot's contract while the protest was pending in our Office. In view of our conclusion that Ameriko's protest is otherwise without legal merit, we will not consider this alleged technical violation. See BECO Corp., B-219651, Nov. 26, 1985, 85-2 CPD ¶ 601.

The protest is denied.

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